DATUK SERI SALAHUDDIN AYUB & ORS v. PERDANA MENTERI, TAN SRI DATO' HJ MAHIADDIN MD YASIN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-32-01-2021]
14 JUNE 2021

ADMINISTRATIVE LAW: *Judicial review – Mandamus – Proclamation of Emergency ('Proclamation') under art. 150(1) of Federal Constitution ('FC') by Yang di-Pertuan Agong acting upon advice of Prime Minister – Promulgation of Emergency (Essential Powers) Ordinance 2021 ('Ordinance') to control and reduce Coronavirus Disease 2019 (Covid-19) cases in Malaysia – Challenge against Proclamation and Ordinance – Whether mandamus order could be made to direct Prime Minister to lay Proclamation and Ordinance before both Houses of Parliament – Whether mandamus order could be made to direct Prime Minister to advise YDPA to summon meeting of Parliament for Proclamation and Ordinance to be laid before both Houses of Parliament*

CONSTITUTIONAL LAW: *Federal Constitution – Article 150 – Proclamation of Emergency ('Proclamation') under art. 150(1) of Federal Constitution ('FC') by Yang di-Pertuan Agong acting upon advice of Prime Minister – Promulgation of Emergency (Essential Powers) Ordinance 2021 ('Ordinance') to control and reduce Coronavirus Disease 2019 (Covid-19) cases in Malaysia – Challenge against Proclamation and Ordinance – Whether arts. 150(6) and 150(8) of FC constitutional – Whether Prime Minister under constitutional duty to advise YDPA to summon meeting of Parliament for Proclamation and Ordinance to be laid before both Houses of Parliament*

Two statements were released to the public on the issuance of a Proclamation of Emergency under art. 150(1) of the Federal Constitution ('FC') made a day earlier by the Yang di-Pertuan Agong ('YDPA'). The first was a media statement issued on behalf of Istana Negara and the second was the speech text of the first respondent, the Prime Minister ('PM'). The two statements stated, (i) the PM had been granted an audience with the YDPA where the PM presented his advice and/or the advice of the Cabinet of Ministers ('Cabinet') for the YDPA to issue a Proclamation of Emergency under art. 150(1) of the FC to control and reduce the Coronavirus Disease 2019 ('Covid-19') cases in Malaysia; (ii) upon receipt of the advice of the PM and/or the Cabinet, the YDPA was of the view that the spread of the Covid-19 pandemic had reached a very critical stage and there was a need to issue a Proclamation of Emergency pursuant to art. 150(1) of the FC; and (iii) consequently, the YDPA issued a Proclamation of Emergency dated 11 January 2021, which was published in the Federal Government *Gazette*

on 12 January as PU(A) 7/2021 (Proclamation of Emergency). The YDPA subsequently promulgated the Emergency (Essential Powers) Ordinance 2021 ('Ordinance') pursuant to art. 150(2B) of the FC. Based on the two statements, the applicants, members of the Dewan Rakyat and the Dewan Negeri, filed the present application for leave to commence judicial review, pursuant to O. 53 of the Rules of Court 2012 ('ROC'), seeking, among others, (i) an order for *mandamus* to direct the first respondent to lay the Proclamation of Emergency and the Ordinance before both Houses of Parliament for all necessary and appropriate resolutions to be passed; and (ii) an order of *mandamus* to direct the first respondent to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed. The issues that arose were: (i) whether art. 150(6) and 150(8) of the FC were unconstitutional having regard to, *inter alia*, arts. 4(1) and 121(1) of the FC and as a result, were null and void and of no legal effect; (ii) whether the respondents were under a constitutional duty, pursuant to art. 150(3) of the FC to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed; (iii) whether a *mandamus* order could be made to direct the first respondent to lay the Proclamation of Emergency and the Ordinance before both Houses of Parliament for all necessary and appropriate resolutions to be passed; and (iv) whether a *mandamus* order could be made to direct the first respondent to advise the YDPA to summon a meeting of Parliament for the Proclamation of Emergency and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions.

Held (dismissing application):

(1) Article 150(8) of the FC bars any challenge against an emergency proclamation and the emergency Ordinances. Looking at the Hansard of the tabling of the Bill for the amendment of art. 150(6) and (8) of the FC dated 9 April 1981, it was crystal clear that the intention of the Parliament was to exclude judicial review of the decision in proclaiming emergency and the Ordinance made under the emergency law. Article 150(8) of the FC is constitutional. No judicial review could be made against the challenge against the decision of the YDPA under art. 150(1) and (2B) of the FC. (paras 68, 70 & 94)

(2) Article 150 of the FC is the governing provision on emergency. Therefore, the respondents' constitutional duty must be stipulated in art. 150 itself. There is not a single sentence in art. 150 which states that the respondents have a constitutional duty to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency

and Ordinance to be laid before both Houses for all necessary and appropriate resolutions to be passed. Article 150 of the FC is also silent on the suspension of the sitting of both Houses of Parliament when a Proclamation of Emergency is in force. (paras 98, 101 & 116)

(3) Order 53 r. 1(2) of the ROC provides that O. 53 is subject to the provisions of Chapter VII of Part 2 of the Specific Relief Act 1950 ('SRA'). Therefore, any application for an order of *mandamus* made by way of judicial review proceedings must comply with the requirement of s. 44 of the SRA. Based on *Koon Hoi Chow v. Pretam Singh*, in order to issue the order of *mandamus*, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific and well-defined as to be free from any reasonable controversy. The order could not be issued when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent will deny the order of *mandamus*. In the context of this application, the YDPA acted on the advice of the PM. One thing must be made clear *ie*, what legal rights that the applicants have in directing the PM to tender the advice to the YDPA. Where a statute imposes a duty, the performance or non-performance of which is not a matter of discretion, *mandamus* may be issued. But if an officer has power and not duty under the law and if he does not use his powers, *mandamus* could not be issued to compel him to exercise his power. There was also no issue that the first respondent had failed to perform a statutory duty with regards to the third and fourth issue. (paras 119, 121, 122, 125, 134 & 136)

(4) The subject matter of this application was not amenable to judicial review. The applicants failed to show that the decision made by the YDPA to proclaim emergency and that the fact His Majesty was acting on the advice of the PM was a result of illegality, unreasonableness or irrationality and procedural impropriety. The subject matter in this case have been settled by law. There was no arguable case for the applicants. (paras 140 & 143)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] 1 LNS 76 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***
Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***
Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tun Dr Mahathir Mohamad v. Datuk Seri Mohd Najib Tun Hj Abdul Razak & Ors And Another Case [2018] 8 CLJ 259 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule para 1
Emergency (Essential Powers) Ordinance 2021, ss. 11(a), (b), 14, 15, 18
Federal Constitution, arts. 4(1), 40(1), 43(3), 44, 55, 70, 71, 73, 74, 76, 121(1), 149, 150(1), (2B), (2C), (3), (5), (6), (8), Eight Schedule, Ninth Schedule
Government Proceedings Act 1956, s. 33(1), (3)
Immigration Act 1959/63, ss. 3(2), 59, 59A
Land Acquisition Act 1960, s. 40D
Prevention and Control of Infectious Diseases Act 1988, ss. 14, 15, 18, 26
Prevention of Crime Act 1959, s. 15B
Rules of Court 2012, O. 53 rr. 1(2), 3(2)
Specific Relief Act 1950, s. 44(2)(a)

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JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicants apply for leave to commence judicial review (encl. 1) pursuant to O. 53 of the Rules of Court (ROC) 2012 *vide* notice of application dated 26 January 2021 for the following reliefs:

(i) A declaration that s. 14 of the Emergency (Essential Powers) Ordinance 2021 published in the Federal Government *Gazette* P.U. (A) 12/2021 on 14 January 2021 (Ordinance) is unconstitutional as being inconsistent with and in breach of *inter alia* arts. 44, 150(3), 150(5) of the Federal Constitution (FC) and is null and void;

(ii) A declaration that s. 15 of the Ordinance is unconstitutional as being inconsistent with and in breach of *inter alia* art. 71, art. 150(2C) and the Eighth Schedule of the FC and is null and void;

(iii) A declaration that s. 11(a) of the Ordinance is unconstitutional as it insulates the Executive from the provisions of *inter alia* art. 43 of the FC and is null and void;

(iv) A declaration that s. 11(b) of the Ordinance is unconstitutional as it conflicts with *inter alia* art. 71 and the Eighth Schedule of the FC and is null and void;

(v) Consequent to prayers (i) to (iv) above, a declaration that ss. 11, 14 and 15 of the Ordinance are invalid, null and void and of no legal force and effect;

(vi) A declaration that art. 150(8) of the FC is unconstitutional having regard to *inter alia* art. 4(1) and art. 121(1) of the FC, and as a result null and void and of no legal effect;

(vii) A declaration that the first respondent and/or second respondent are under a constitutional duty pursuant to art. 150(3) of the FC to forthwith advise the Yang di-Pertuan Agong (YDPA) to forthwith summon a meeting of the Parliament for the Proclamation of Emergency and Ordinance to forthwith be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with the mandatory provisions of art. 150(3) of the FC;

(viii) An order for *mandamus* directing the first respondent to forthwith lay the Proclamation of Emergency dated 11 January 2021 published in the Federal Government *Gazette* P.U.(A) 7/2021 on 12 January 2021 (Proclamation of Emergency) and the Ordinance before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with the mandatory provisions of art. 150(3) of the FC;

(ix) Further or in the alternative, an order for *mandamus* directing the first respondent to forthwith advise the YDPA to forthwith summon a meeting of the Parliament for the Proclamation of Emergency and the Ordinance to forthwith be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with the mandatory provisions of art. 150(3) of the FC;

(x) No order as to cost; and

(xi) Such further and/or other relief that this Honourable Court deems fit, just and proper and/or otherwise appropriate to be granted.

[2] After detailed considerations of the applicants' application for leave for judicial review (encl. 1), the statement filed pursuant to O. 53 r. 3(2) of the ROC 2012, the affidavit in support, written submissions as well as oral submissions by both parties, I dismissed the applicants' application in encl. 1. This judgment contains the full reasons for my decision.

[3] The relevant cause papers before this court are as follows:

(i) Application for judicial review dated 26 January 2021;

(ii) Statement pursuant to O. 53 r. 3(2) of the ROC 2012 dated 26 January 2021 (statement);

(iii) Affidavit in support affirmed by Salahuddin bin Ayub on 25 January 2021 (affidavit in support); and

(iv) Supplementary affidavit affirmed by Muhammad Hiqmar Danial bin Hidzir on 29 January 2021.

Background Facts

[4] The background facts of this case are largely undisputed. The narration of the background facts herein is adopted with and/or without modifications from the statement and affidavit in support.

[5] At all material times, the applicants are members of the Dewan Rakyat and Dewan Negeri as follows:

(i) The first applicant, is a Member of Dewan Rakyat for Pulai and a Member of the Johor State Legislative Assembly for Simpang Jeram;

(ii) The second applicant, is a Member of the Dewan Rakyat for Sungai Petani and a Member of the Kedah State Legislative Assembly for Gurun; and

(iii) The third applicant, is a Member of the Perak State Legislative Assembly for Tebing Tinggi.

[6] On 12 January 2021, two statements were released to the public on the issuance of a Proclamation of Emergency under art. 150(1) of the FC made a day earlier by His Majesty the YDPA Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah AI-Musta'in Billah. The first was a media statement issued on behalf of the Istana Negara and the second was the speech text of the first respondent, Prime Minister – Tan Sri Dato' Haji Mahiaddin bin Md. Yasin (the Prime Minister or Tan Sri Muhyiddin). The Prime Minister had also

delivered a speech based on the text which was widely broadcasted live on Malaysian television and on social media. The two statements, state as follows:

(i) On 11 January 2021, the Prime Minister had been granted an audience with the YDPA whereat the Prime Minister presented his advice and/or the advice of the Cabinet of Ministers (Cabinet) for the YDPA to issue a Proclamation of Emergency under art. 150(1) of the FC to control and reduce the Coronavirus Disease 2019 (COVID-19) cases in Malaysia.

(ii) Upon receipt of the advice of the Prime Minister and/or the Cabinet, the YDPA was of the view that the spread of the COVID-19 pandemic had reached a very critical stage and there was a need to issue a Proclamation of Emergency pursuant to art. 150(1) of the FC.

(iii) Consequently, the YDPA issued a Proclamation of Emergency dated 11 January 2021 which was published in the Federal Government *Gazette* (*Gazette*) on 12 January 2021 as P.U.(A) 7/2021 (Proclamation of Emergency).

[7] In the Proclamation of Emergency, it is stated that the YDPA was satisfied that a grave emergency exists whereby the security, economic life and public order in Malaysia are threatened arising from the COVID-19 pandemic. After stating that art. 150(1) of the FC granted the YDPA the power to issue a Proclamation of Emergency, the YDPA proclaimed that a grave emergency existed and that the Proclamation of Emergency shall extend throughout the Federation of Malaysia with effect from 11 January 2021 until 1 August 2021.

[8] Two days after that, the YDPA promulgated the Emergency (Essential Powers) Ordinance 2021 (Ordinance) pursuant to art. 150(2B) of the FC on the premise that the YDPA was satisfied that immediate action was required. In the Ordinance, it is stated that a Proclamation of Emergency had been issued by the YDPA by reason of a grave emergency threatening the security, economic life and public order of the Federation of Malaysia arising from the COV1D-19 pandemic.

[9] The Ordinance was gazetted and published in the Federal Government *Gazette* P.U. (A) 12/2021 on 14 January 2021 and consist of 18 provisions.

(i) Particularly, ss. 14 and 15 of the Ordinance provides that the sitting of Parliament and/or State Legislative Assemblies for so long as the emergency is in force shall be summoned, prorogued and dissolved on a date as the YDPA thinks appropriate and that any meeting of the Parliament and/or State Legislative Assemblies which has been summoned before the coming into operation of the Ordinance but has not been held, is cancelled.

(ii) Additionally, s. 11(a) of the Ordinance provides that for so long as the Emergency is in force, the Prime Minister and the Cabinet existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021, who have been conferred Executive functions, shall continue to exercise the Executive authority of the Federation and such other persons who have been conferred the Executive functions by law shall continue to exercise such functions.

(iii) Section 11(b) of the Ordinance provides that for so long as the emergency is in force, the Menteri Besar or Chief Minister and the State Executive Council or State Cabinet of the respective States existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021, who have been conferred Executive functions, shall continue to exercise the Executive authority of the States and such other persons who have been conferred the Executive functions by law shall continue to exercise such functions.

COVID-19 In Malaysia And Prevention And Control Of Infectious Diseases Act 1988

[10] Malaysia began to report cases of COVID-19 in January 2020. By early March 2020, the number of COVID-19 cases began to rise and on 17 March 2020, the second respondent, which is the Government of Malaysia (Government), declared all States and Federal Territories in Malaysia as infected local areas under the Prevention and Control of Infectious Diseases Act 1988 (1988 Act).

Movement Control Order

[11] In the Government's efforts to curb the rising cases of COV1D-19 in Malaysia, a nationwide lockdown was imposed pursuant to the 1988 Act, known as the Movement Control Order (MCO), which took effect from 18 March 2020 to 31 March 2020. It is reported that the purpose of the MCO was to control the spread of the infection of COVID-19 in Malaysia. The MCO came into effect by way of a Federal *Gazette* P.U. (A) 91/2020 published on 18 March 2020 (the MCO Regulations).

[12] Under the MCO Regulations, no persons were allowed to journey from one place to another, save for specific reasons listed in the MCO Regulations; no large gatherings were allowed save for funerals, and a written permission from the police was required for the purposes of travelling from one area to another. In other words, all inter-State travel was banned during the MCO period unless police permission was given.

[13] As a result of the imposition of the MCO, most businesses were closed and only those that fell under the ambit of essential services, such as supermarkets, pharmacies etc, were allowed to continue operation during the

MCO period. Any persons found to be in breach of the MCO Regulations was liable to a fine not exceeding RM1,000 or imprisonment for a term not exceeding six months or both.

[14] For the purposes of the MCO, the police forces were mobilised to set up roadblocks throughout Malaysia. Subsequently, the armed forces were also mobilised to assist the police handling the roadblocks.

[15] Due to the continued rise in COVID-19 cases, the MCO period was periodically extended. In total, there were three extensions, the last extension was from 29 April 2020 to 12 May 2020. The MCO Regulations were amended from time to time, and when required, new regulations were published in the Federal Government *Gazette* to replace the MCO Regulations.

Enhanced Movement Control Order

[16] In the meantime, the Government had also declared stricter lockdown on specific places where clusters of COVID-19 cases exist. This stricter lockdown was known as the Enhanced Movement Control Order (EMCO) where these specific places were barricaded, and no one was allowed to enter or exit the area.

[17] The powers exercised by the Government in the implementation of the EMCO are based on the provisions under the 1988 Act.

Conditional Movement Control Order

[18] On 1 May 2020, as the level of COVID-19 cases in Malaysia began to reduce, the Government announced that from 4 May 2020 to 12 May 2020, there will be a partial lockdown ie, the Conditional Movement Control Order (CMCO) instead of the MCO.

[19] Under the CMCO, the strict MCO Regulations were relaxed, businesses other than those deemed to be essential services were allowed to open however, there were still restrictions to the movement of persons and no large gatherings were permitted.

Recovery Movement Control Order

[20] The CMCO eventually ended on 9 June 2020 and the Government announced that the country will now enter the path of recovery and introduced a further relaxed lockdown known as RMCO which was to take effect from 10 June 2020 to 31 August 2020. During the RMCO, new regulations were introduced which were amended from time to time.

[21] On 28 August 2020, the Government subsequently extended the period of RMCO until 31 December 2020.

CMCO Imposed On The States Of Selangor, Sabah And The Federal Territory Of Kuala Lumpur

[22] In October 2020, due to the rise of COVID-19 cases in the State of Sabah, Senior Minister, Datuk Seri Ismail Sabri Yaakob issued a press statement on 12 October 2020 that CMCO will be imposed in Sabah. The CMCO took effect on 13 October 2020.

[23] In the meantime, the COVID-19 cases in the States of Selangor and the Federal Territories of Kuala Lumpur and Putrajaya were also increasing. On 12 October 2020, by a press statement issued by the Senior Minister, Datuk Seri Ismail Sabri Yaakob, it was announced that the CMCO will be re-imposed in Selangor and the Federal Territories of Kuala Lumpur and Putrajaya beginning from 14 October 2020 to 26 October 2020.

[24] The CMCO was subsequently extended periodically. The last extension of the CMCO in the States of Sabah, Selangor and the Federal Territories of Kuala Lumpur and Putrajaya was until 14 January 2021.

[25] However, despite the CMCO, on 5 December 2020, Senior Minister Datuk Seri Ismail Sabri Yaakob announced that the Government would allow unrestricted interstate travel across states and districts from 7 December 2020 with the exception of areas under the EMCO, which will still require a police permit.

[26] Meanwhile, further regulations were issued under the 1988 Act to curb the spread of COVID-19.

Re-Introduction Of The MCO

[27] On 11 January 2021, the Government re-imposed the MCO on the States of Penang, Selangor, Melaka, Johore, Sabah and the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. The MCO was to take effect from 13 January 2021 to 26 January 2021.

Powers Under The 1988 Act

[28] The 1988 Act empowers any authorised officer to take any measures that are considered necessary to control the disease in the infected local area declared under the 1988 Act.

[29] As stated above, such powers include, *inter alia*, the following:

(i) To declare an area as an infected local area;

(ii) To impose lockdown and set conditions for the movement of people in varying degrees, that is the MCO, EMCO, CMCO and RMCO;

(iii) To mobilise the police and armed forces to assist in imposing the lockdowns and the regulations made under the 1988 Act;

(iv) To declare quarantine centres which is used to isolate and treat COVID-19 patients;

(v) To penalise and fine any persons which did not comply with the regulations made under the 1988 Act.

[30] There are also express provisions under the 1988 Act for the following:

(i) Isolation of infected persons to a quarantine station for treatment and the detention thereof of the persons at the station until he can be discharged without danger to the public (s. 14);

(ii) Observation and surveillance of contacts of an infected person (s. 15);

(iii) Disinfection and closure of premises (s. 18); and

(iv) Requisition of premises necessary for the carrying out of any of the provisions of the 1988 Act and the regulations made thereunder (s. 26).

Cases Of COVID-19 Flattened

[31] Since early 2020 when the pandemic started, the actions taken by the Government, including *via* the MCO, EMCO and CMCO, have been vigorously pursued to tackle the COVID-19 pandemic in Malaysia with varying degrees of success.

Proclamation Of Emergency And The Promulgation Of The Ordinance

[32] On or about 11 January 2021, the Prime Minister and/or the Cabinet advised the YDPA for His Majesty to proclaim an emergency pursuant to art. 150 of the FC on the basis that the security, economic life and public order of Malaysia is threatened due to the COVID-19 pandemic. On the same day, the YDPA issued the Proclamation of Emergency, the details of which have been set out above.

[33] On 14 January 2021, the Ordinance was promulgated by the YDPA on the advice of the Prime Minister and/or the Cabinet, pursuant to art. 150(2B) of the FC and the same was gazetted in the Federal Government *Gazette* P.U. (A) 12/2021 on 14 January 2021. The details have been set out above.

Applicants' Grounds For Judicial Review

[34] Based on the statement, the applicants seek to challenge the following:

Sections 11, 14 And 15 Of The Ordinance Are Justiciable

[35] Article 150(6) and art. 150(8) of the FC do not prevent the applicants from challenging ss. 11, 14 and 15 of the Ordinance. Article 150 of the FC does not exclude Parliament from carrying out its, *inter alia*, legislative functions.

[36] As such, the application herein is a challenge against ss. 11, 14 and 15 of the Ordinance. Articles 150(6) and 150(8) of the FC are unconstitutional having regard to *inter alia* arts. 4(1) and 121(1) of the FC.

[37] Therefore, the constitutionality of ss. 11, 14 and 15 of the Ordinance are justiciable.

Sections 11, 14 And 15 Of The Ordinance Are Invalid, Null And Void, And Of No Legal Force And Effect

[38] Additionally, ss. 11, 14 and 15 of the Ordinance are unnecessary, irrational, unreasonable and/or disproportionate for the following reasons:

(i) The MCO, EMCO, RMCO and CMCO are sufficient enforcement and adequate measures to manage the spread of COVID-19;

(ii) The COVID-19 pandemic could be sufficiently managed using existing laws *inter alia*, the 1988 Act and/or Police Act 1967, which have provided the Executive with wide powers;

(iii) The incapacitation of the Parliament and/or State Legislative Assemblies by ss. 14 and 15 of the Ordinance, is unnecessary, irrational, unreasonable and/or disproportionate for the purposes of combating the COVID-19 situation or pandemic;

(iv) There is no basis whatsoever for the Parliament and/or State Legislative Assemblies to be suspended, as other economic sectors are allowed to operate during the period of this proclamation;

(v) The suspension of Dewan Rakyat and/or State Legislative Assemblies does not aid the purpose of containing the COVID-19 situation or pandemic; and

(vi) The entrenchment of the Prime Minister and the Cabinet in the Federal Government and the entrenchment of the Chief Ministers and/or the State Cabinets in the State Governments by s. 11 of the Ordinance are unnecessary, irrational, unreasonable and/or disproportionate for the purposes of combating the COVID-19 situation or pandemic.

[39] Sections 14 and 15 of the Ordinance provide that, for so long as the emergency is in force, the sitting of Parliament and/or State Legislative Assemblies shall be summoned, prorogued and dissolved on a date as the YDPA thinks appropriate, and that any meeting of the Parliament and/or State Legislative Assemblies which has been summoned before the coming into operation of the Ordinance but has not been held is cancelled.

[40] Section 11 of the Ordinance provides that, for so long as the emergency is in force, the Prime Minister and the Cabinet shall continue to exercise its Executive functions. The same is also applicable to the Menteri Besar or the Chief Minister and the State Executive Council or the State Cabinet of the respective States.

[41] Essentially, ss. 14 and 15 of the Ordinance have the same effect as suspending Parliament and/or State Legislative Assemblies and barring them from carrying out their constitutional functions, particularly as a check and balance of the Executive. The Prime Minister and/or the Cabinet, and the Chief Minister and/or the State Cabinet may continue to exercise its Executive functions without being accountable to Parliament and/or its respective State Legislative Assemblies. Denying the rights of Parliament and/or State Legislative Assemblies to sit prevents these Legislative Assemblies from carrying out their constitutional functions as a Legislature and as a body responsible for the supervision of the Executive. It also impedes and frustrates the operation of the constitutional principle of public accountability. As Members of the Dewan Rakyat and/or the State Legislative Assemblies, the applicants are adversely affected.

[42] More importantly, art. 150(3) of the FC requires any emergency proclamation and ordinances pursuant thereto to be laid before both Houses of Parliament, so that they be subjected to the scrutiny of the Houses of Parliament, including the Dewan Rakyat and to its resolutions, if necessary, on whether it should be continued or annulled.

[43] Section 14, which renders completely ineffective the provisions of the FC relating to summoning, proroguing and dissolution of Parliament for it to carry out this role and duty as set out in arts. 55 and 150(3) of the FC, consequently frustrates the operation of art. 150(3) of the FC.

[44] The constitutional functions of Parliament, that is to *inter alia*, consider and debate any ordinances promulgated under the Proclamation of Emergency, including this Ordinance, have been thus usurped and undermined by ss. 14 and 15 of the Ordinance.

[45] Henceforth, the promulgation of ss. 14 and 15 of the Ordinance frustrate or prevent the constitutional role of the Parliament and/or the State Legislative Assemblies in supervising and holding the Government (Federal and/or State) accountable.

[46] This is further reflected in the operation of s. 11 of the Ordinance which subverts the democratic and constitutional process and entrenches the position of the current Executive at both the Federal and State level. This is against *inter alia* art. 43 of the FC with regard to the Federal Government and against *inter alia* art. 71 and the Eighth Schedule of the FC and/or the various State Constitutions with regard to the State Governments.

[47] For the above reasons, ss. 11, 14 and 15 of the Ordinance are unconstitutional.

Sections 14 And 15 Of The Ordinance Are Unconstitutional

[48] Pursuant to art. 150(3) of the FC, the Ordinance shall be laid before both Houses of Parliament, failing which, it shall cease to have effect.

[49] Given that ss. 14 and 15 of the Ordinance has the net effect of suspending Parliament and/or State Legislative Assemblies, the said provisions are contrary to the intent and spirit of art. 150 of the FC which guarantees the constitutional role of Parliament and/or State Legislative Assemblies even during emergencies. Consequently, ss. 14 and 15 of the Ordinance are unconstitutional and contrary to *inter alia* art. 150 of the FC itself and to that extent are invalid, null and void and of no legal force.

Suspension Of State Legislative Assemblies By The Ordinance Is Unconstitutional

[50] Further to the above, whilst the YDPA may promulgate Ordinances under art. 150(2B) of the FC, the power of the YPDA to promulgate such ordinances is in respect to matters which Parliament has power to make pursuant to art. 150(2C) of the FC.

[51] In this regard, s. 15 of the Ordinance which provides for the YDPA to summon, prorogue and dissolve the State Legislative Assemblies and/or to cancel any meeting/s of the State Legislative Assemblies is unconstitutional in that it is in contravention of *inter alia* arts. 70, 71, 73, 74, 76, 150(2C), the Eighth Schedule and the Ninth Schedule of the FC.

Section 11 Of The Ordinance Is Unconstitutional

[52] Section 11(a) of the Ordinance is in contravention of *inter alia* art. 43(3) of the FC in that the Prime Minister and/or the Cabinet shall be responsible to Parliament.

[53] Section 11(b) of the Ordinance is in contravention of *inter alia* art. 71 and the Eighth Schedule of the FC and/or the various State Constitutions in that the Chief Minister and/or the State Cabinet shall be responsible to the respective States Legislative Assemblies.

[54] When s. 11 is read together with ss. 14 and 15 of the Ordinance, there is no check and balance to hold the Prime Minister and/or the Cabinet, and the Chief Minister and/or the State Cabinet accountable in the manner the Prime Minister and/or the Cabinet, and the Chief Minister and/or the State Cabinet exercises its powers.

Articles 150(6) And 150(8) Of The FC Are Unconstitutional

[55] The actions of the Prime Minister and/or the Cabinet, and the Chief Minister and/or the State Cabinet must always be subject to the scrutiny of the Judiciary to avoid abuse of power, oppression by and arbitrariness of the Government going unchecked.

[56] Any provision which prevents the courts from reviewing the acts of other branches of the Government violates the separation of powers which is a fundamental construct and edifice of the FC founded on the rule of law. It is inconsistent with a harmonious reading of art. 4(1) and 121(1) of the FC and hence void.

[57] In that context, consequently, art. 150(6) and art. 150(8) of the FC, which was inserted pursuant to s. 15 of the Constitution (Amendment) Act 1981, are unconstitutional and to the extent, null, void and of no legal force and effect.

Principle In An Application For Leave

[58] The law in relation to application for leave is provided for under O. 53 r. 3 of the ROC 2012.

[59] In the case of *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224 at 225; Visu Sinnadurai J (as he then was) held that:

> ... The court, in exercising its discretion that an application for leave be granted, must be convinced by the applicants that *prima facie* the application is genuine and there is some substance in the grounds supporting the application. *The test's threshold is very low; a prima facie case of reasonable suspicion, an arguable case must be shown, not a prima facie case. Additionally, an application will fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial review is inappropriate.* (emphasis added)

[60] In *Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] 1 LNS 76; [1989] 3 MLJ 298 at 298; Judge Edgar Joseph J (as he then was) held that:

> ... the test in an application for leave is whether the applicant has an arguable case for review, a sufficient interest and whether there has been any undue delay.

[61] The Court of Appeal in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 at 929; held:

> Applications for leave under O. 53 are made – and they must be made – through a two stage process. **The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous.** If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave *in limine*. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, e,g. proceedings in Parliament, (paras 5 & 10). (emphasis added)

[62] Further in the case of *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 at 33; the then Supreme Court had decided:

A [2] In his grounds of judgment, the *learned Judicial Commissioner had gone further that the leave stage and embarked on substantial issues on merit. This was not the right approach when application for leave to apply for an order of certiorari is made.* The guiding principles ought to be that *the applicants must show prima facie that the application is not frivolous, vexatious and that there is some substance in the grounds supporting the application.* (emphasis added)

B

Decision Of The Court

[63] Having perused the cause papers, I am of the view that the issues to be determined are as follows:

C (i) Whether art. 150(6) and 150(8) of the FC are unconstitutional having regard to *inter alia* art. 4(1) and art. 121(1) of the FC, and as a result null and void and of no legal effect;

(ii) Whether the respondents are under a constitutional duty pursuant to art. 150(3) of the FC to advise the YDPA to summon a meeting of the
D Parliament for the Proclamation of Emergency and Ordinance to be laid before both Houses for all necessary and appropriate resolutions to be passed.

(iii) Whether a *mandamus* order can be made to direct the first respondent to lay the Proclamation of Emergency and the Ordinance before both
E Houses of Parliament for all necessary and appropriate resolutions to be passed.

(iv) Whether a *mandamus* order can be made to direct the first respondent to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and the Ordinance to be laid before both
F Houses of Parliament for all necessary and appropriate resolutions to be passed.

First Issue: Whether Article 150(6) And 150(8) Of The FC Are Unconstitutional Having Regard To Inter Alia Article 4(1) And Article 121(1) Of The FC, And As A Result Null And Void

G

[64] The first applicant in his affidavit avers that arts. 150(6) and 150(8) of the FC are unconstitutional. The first applicant further stated that the actions of the Prime Minister and/or the Cabinet, and the Chief Minister and/or the State Cabinet must always be subject to the scrutiny of the court
H to avoid abuse of power, oppression by and arbitrariness of the Government.

[65] Thus, the first applicant believes that art. 150(6) and art. 150(8) of the FC, are unconstitutional and to the extent, null, void and of no legal force and effect.

[66] Article 150 of the FC is reproduced herein as follows to highlight
I cls. (6) and (8):

Proclamation of Emergency

150. (6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

...

(8) Notwithstanding anything in this Constitution:

(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of:

(i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance.

[67] The issue that needs to be considered is whether the decision of His Majesty the YDPA in proclaiming emergency and the Ordinance promulgated could be questioned in courts.

[68] Article 150(8) of the FC bars any challenge be made against emergency proclamation and the emergency ordinances. Article 150(8) was only inserted in 1981 through a constitutional amendment which resulted the emergency proclamation and ordinances immunised from judicial review.

[69] During the tabling of the amendment of art. 150 of the FC on 9 April 1981, the then Deputy Prime Minister, Dato Seri Dr. Mahathir bin Mohamad stated as follows:

Tuan Yang di-Pertua, cadangan pindaan Perkara 150 melibatkan beberapa fasal. Tujuan yang pertama ialah bagi membolehkan Yang di-Pertuan Agong membuat perisytiharan darurat sebelum berlakunya peristiwa sebenar yang mengancam keselamatan dan ekonomi negara. Yang kedua ialah bagi membolehkan Yang di-Pertuan Agong mengeluarkan perisytiharan-perisytiharan yang berbeza dan selagi perisytiharan tersebut masih berkuatkuasa Yang di-Pertuan Agong boleh membuat Ordinan-ordinan semasa kedua-dua Dewan tidak bersidang dan Ordinan-ordinan ini berkuatkuasa sama seperti yang diluluskan oleh Parlimen. Di samping itu *cadangan pindaan ini adalah bagi menentukan bahawa sebab-sebab Yang di-*

A *Pertuan Agong mengisytiharkan darurat, Perisytiharan Darurat dan kuatkuasanya serta Ordinan-ordinan dan kuatkuasa Ordinan-ordinan tersebut tidak boleh dicabar di mana-mana Mahkamah.* Takrif 'sitting' juga dimasukkan di mana takrif 'sitting' bagi Perkara ini ialah semasa Dewan menjalankan urusannya.

Cadangan pindaan kepada Perkara 150 ini adalah bagi memperkemaskan
B Perisytiharan Darurat dan Ordinan-ordinan yang dibuat di bawah kuasa ini. Oleh itu walaupun pada dasarnya pindaan-pindaan melibatkan banyak fasal-fasal tetapi dari segi maksudnya adalah tidak banyak berbeza dengan peruntukan yang ada mengenai Perkara ini, iaitu bagi mengadakan satu peruntukan Darurat di dalam Perlembagaan, yang mana ini sangat penting bagi keselamatan dan ketenteraman negara.

C Kelemahan yang ada pada Perkara 150 adalah berpandukan kepada pendapat Privy Council semasa memutuskan kes Teh Cheng Poh. Sebagaimana Ahli-ahli Yang Berhormat sedia maklum, Teh Cheng Poh adalah seorang banduan yang dikenakan hukuman mati di bawah Akta Keselamatan Dalam Negeri yang merayu ke Privy Council. Privy Council
D berpendapat bahawa apabila sahaja Parlimen dipanggil bersidang (sitting) ianya dianggap masih bersidang sehingga masa Parlimen diberhenti (prorogued) atau dibubarkan (dissolved). Oleh itu Yang di-Pertuan Agong tidak mempunyai kuasa membuat Ordinan Darurat sehingga Parlimen diberhentikan atau dibubarkan. Keadaan sedemikian akan menimbulkan kesulitan pada masa Kerajaan perlu mengambil tindakan serta-merta demi
E keselamatan negara.

Adalah menjadi tugas utama bagi Kerajaan menjamin dan mengekalkan keselamatan dan ketenteraman negara setiap masa. Oleh itu sangatlah perlu bagi Kerajaan diberi kuasa yang luas bagi mengambil apa-apa tindakan yang difikirkan perlu bagi maksud untuk mengekalkan keselamatan dan
F ketenteraman negara. *Perisytiharan darurat adalah satu-satunya tindakan yang perlu diambil jika terdapat bukti-bukti yang menunjukkan bahawa jika tindakan yang berkesan tidak diambil dengan secepat mungkin besar kemungkinan akan berlaku huru-hara di dalam negara yang akan melibatkan pengorbanan nyawa dan kehancuran harta benda orang-orang yang tidak berdosa. Maklumat-maklumat seperti itu tidaklah bijak dikemukakan di Mahkamah atas sebab-sebab*
G *keselamatan. Oleh itu sangatlah penting perisytiharan darurat tidak boleh dicabar di Mahkamah.* Di samping itu adalah sangat penting dimasukkan peruntukan yang membolehkan perisytiharan darurat dibuat sebelum terjadinya peristiwa sebenar, kerana kita tidak mahu melihat terjadinya pertumpahan darah dan negara diancam oleh peristiwa-peristiwa sebenar yang tidak dapat dielakkan jika tindakan yang berkesan tidak diambil
H dengan secepat mungkin.

Dengan pindaan Perkara 150 ini, walaupun Yang di-Pertuan Agong mempunyai kuasa yang luas di dalam Perisytiharan Darurat tetapi saya penuh yakin yang Baginda dan Kerajaan akan menggunakan kuasa ini sebijak-bijaknya. (emphasis added)

I

[70] Looking at the Hansard of the tabling of the Bill for the amendment of art. 150(6) and (8) of the FC dated 9 April 1981, it is crystal clear that the intention of the Parliament was to exclude judicial review of the decision in proclaiming emergency and the Ordinance made under the emergency law.

[71] Hence, based on the Hansard, the intention of the Legislators was clear. The insertion of art. 150(6) and (8) of the FC was meant to shut the doors of the court from any challenge of the law made during the emergency and the proclamation of emergency by the YDPA.

[72] The effect of art. 150(8) of the FC was discussed in *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457 at 469 & 470; [2002] 3 MLJ 193 at 208, where the Federal Court speaking through Haidar FCJ (as he then was) held that no challenge could be made to the continued operation of ordinances made under art. 150 of the FC. His Lordship remarked that:

> ... Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art. 150 (the proclamation of emergency). *It should be noted that there is the overriding provision in cl. (8)(b) of art 150 itself that 'notwithstanding anything in this Constitution' the court shall have no jurisdiction to entertain or determine any application in whatever form, on any ground, regarding the validity of, inter alia, the continuation in force of the Ordinance.* It may be argued that such a constitutional provision would amount to 'closing the doors of the court' and is therefore harsh and unjust. *Our answer is that this issue should be addressed to the Legislature and not the courts by those who disagreed with such provision and they have their remedy at the ballot box* (*Lok Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p 188).
>
> (emphasis added)

[73] The effect of such clause was also referred to by the Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP* [2000] 2 CLJ 695 at 707 & 708; [2000] 2 MLJ 486 at 499 where it was held that by virtue of art. 150(8) of the FC, the court has no jurisdiction to entertain or determine any application regarding the validity of the continuance in force of the Ordinance. Lamin PCA (as he then was) stated as follows:

> *... In other words, even after the process of annulment has been completed with the result that the Ordinance has been properly and finally annulled, that does not prevent the Yang di-Pertuan Agong from issuing another Ordinance under cl (2B) and his decision to do so cannot be questioned by virtue of cl (8) of art 150.* The answer to the problem in the present case is found in sub-cl (b) of cl (8) and it reads ...
>
> *It is clearly stipulated under para (iv) of sub-cl (b) above, that the court has no jurisdiction 'to entertain or determine any application, question or proceeding, in whatever form, on any ground regarding the validity of the Ordinance' or 'the continuation in force of any such Ordinance'. Now that no resolution has been laid and passed by the Dewan Negara, Ordinance 22 must be taken to continue to have*

A *the full force of law. Whatever the reason or ground advanced or intention expressed that a resolution would as a matter of course be tabled before the Dewan Negara, we will go so far as to say that the court in this country has no power even to express an opinion.* (emphasis added)

Constitutional Supremacy And Separation Of Powers

B **[74]** The applicants in his affidavit also aver that art. 150(8) is unconstitutional since it is inconsistent with art. 121(1) of the Constitution and violates the doctrine of the separation of powers and thus is void according to art. 4(1) of the FC.

C **[75]** Article 4(1) of the FC provides as follows:

Supreme law of the Federation

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

D **[76]** According to art. 4(1) of the FC, any law passed which is inconsistent with the FC shall, to the extent of the inconsistency, be void.

[77] In *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561; [2017] 4 MLRA 554 (*Semenyih Jaya*), the case concerned on the amount of compensation that had
E to be paid to the landowner arising from an acquisition of its land. The Federal Court dealt with the concept of the judicial power under the FC, with reference to the s. 40D of the Land Acquisition Act 1960. According to the provision, it is provided that the final decision on compensation for compulsory land acquisition is to be determined not by the judge, but by the
F two assessors sitting with him in the High Court.

[78] The Federal Court held that the taking away of the power of the High Court Judge to decide on compensation, and instead to bind them to the decision of assessors, was in violation of the doctrine of separation of powers.
G As for the interpretation of art. 121 of the Federal Constitution, the Federal Court accepted that the constitution of Malaysia had an inviolable basic structure and held in unequivocal terms that the separation of powers is a part of that basic structure.

[79] The Federal Court unanimously decided *inter alia* that:

H [84] Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere ...

[86] ... [T]he judicial power of the court resides in the Judiciary and no
I other as is explicit in art 121(1) of the Constitution ...

[88] The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.

[89] This is essentially the basis upon which rests the edifice of judicial power.

[90] The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.

[80] The Federal Court in *Semenyih Jaya* gave substantive effect to the basic structure doctrine. The decisions of the Federal Court in *Semenyih Jaya*, also emphasised that the basic structure components (of which judicial review was integral) are sacrosanct in our constitutional framework. (See *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545; [2018] 2 MLRA 1 (*Indira Gandhi*); *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333; [2010] 2 AMR 301 (*Sivarasa*); *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 3 MLRA 1; [2019] 4 MLJ 1 (*Alma Nudo Atenza*)).

[81] *Semenyih Jaya* has also laid the foundation that the judicial function is the foundation of the principles of the separation of powers. Ouster clauses which strip the courts of their supervisory judicial function to examine whether a public body has acted unconstitutionally should be declared to be unconstitutional despite it being explicitly worded ousting judicial review.

[82] The discussion on the doctrine of separation of powers and constitutional supremacy did not stop there. Interestingly enough, the Federal Court's decision in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 3 MLRA 1; [2021] 1 MLJ 750; (*Maria Chin*) held that the constitutional supremacy does not allow any doctrine of law to take precedence over the written terms of the FC.

[83] In this case, the appellant who was the chairperson of a non-governmental organisation (NGO) known as "Bersih 2.0" and was a holder of a valid Malaysian passport had been denied from leaving the country. On 15 May 2016, after collecting her boarding pass at the Kuala Lumpur International Airport for a flight to South Korea, she was stopped by the immigration authorities and was told that there was a travel ban imposed on her and that she could not leave the country. No reason was given to the appellant for the travel ban, before or after the incident.

[84] There were three leave questions posed for the Federal Court to decide:

(i) Whether s. 3(2) of the Immigration Act empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticising the Government?

(ii) Whether s. 59 of the Immigration Act is valid and constitutional?

(iii) Whether s. 59A of the Immigration Act is valid and constitutional in the light of *Semenyih Jaya* (*supra*) and *Indira Gandhi* (*supra*).

[85] Abdul Rahman Sebli FCJ in his judgment held as follows:

> [253] The doctrine of constitutional supremacy does not allow any doctrine of law to take precedence over the written terms of the Federal Constitution, Further, based on the historical antecedent of the Federal Constitution, section 59A of the Immigration Act is not constitutionally objectionable. Therefore, I reject the appellant's argument that section 59A of the Immigration Act is unconstitutional and has "no leg to stand on" in the light of *Semenyih Jaya, Indira Gandhi* and *Alma Nudo Atenza.*
>
> [254] In the upshot, I hold that sections 59 and 59A of the Immigration Act are not void for being inconsistent with Article 4(1) read with Article 121(1) of the Federal Constitution. The limitation of the court's review power by section 59A of the Immigration Act falls squarely within the power of Parliament to legislate pursuant to the power conferred on it by Article 121(1) of the Federal Constitution and is not in breach of the doctrine of separation of powers, which cannot in any event prevail over the written constitution.

Ouster Clauses

[86] Ouster clauses are statutory provisions that intended to prohibit certain governmental decisions or actions from being subjected to judicial review by the court.

[87] They are considered as controversial because such clauses are perceived as an attempt by Parliament and the Executive to suppress constitutional powers given to the court under the Constitution. Hence, ouster clauses have a precarious relationship with the rule of law merely because they are used to put certain administrative decisions beyond challenge in the courts, and apparently, such clauses are also within the limits of the Constitution.

[88] In the recent Federal Court's case of *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors and Other Appeals* [2021] 4 CLJ 1; [2021] 3 MLRA 260; [2021] 2 MLJ 822 (*Ravin Joty*) the issue raised before the Federal Court was whether s. 15B of the Prevention of Crime Act 1959 (POCA) (an ouster clause provision) which limits the exercise of judicial review power is *ultra vires* art. 121(1) of the FC and therefore unconstitutional.

[89] The Federal Court, in a majority judgment dismissed the appeal and held that s. 15B of POCA is constitutional. On the issue whether s. 15B of POCA which was enacted under art. 149 ousts jurisdiction of the courts to exercise judicial review is unconstitutional by virtue of art. 4(1) of the FC, the Federal Court answered it in negative. Speaking through Zabariah Mohd Yusof FCJ the Federal Court held:

> [98] Hence, premised on the aforesaid, it cannot be said that by limiting the courts' power in section 15B of POCA, the legislature/Parliament has encroached on the jurisdiction of the courts. It is the legislature/ Parliament that confer the court that jurisdiction and power. As such, there is no usurpation of judicial powers by the legislature. The courts exercise its power as provided by the POCA, a federal law, which is precisely what Article 121(1) of the FC provides.

[90] Thus the issue is whether the ouster clause of art. 150(8) of the FC, which has the effect of ousting the jurisdiction of the court is unconstitutional. My answer is in the negative. This is in light of the recent decision of the Federal Court relating to ouster clause. (See *Ravin Joty* (*supra*) and *Maria Chin* (*supra*).

[91] In *Ravin Joty*, the majority judgment of the Federal Court held that the ouster clause does not suppress constitutional powers given to the courts as provided under art. 121(1) of the FC. Neither does it encroach on judicial power thus breaching the doctrine of the separation of powers. It is unconstitutional, only if it is inconsistent with any other provision of the FC.

[92] Similarly in *Maria Chin*, the majority judgment the Federal Court held that the doctrine of separation of powers cannot override the written terms of the FC, the supreme and highest law of the land. (See also *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277; [2020] 5 MLRA 636; [2020] 7 AMR 233).

[93] The recent majority judgments of *Ravin Joty* and *Maria Chin* have diluted the judgments relied on by the applicants in particular *Semenyih Jaya, Alma Nudo Atenza, Indira Gandhi*, and also *Sivarasa* on the issue of separation of powers and the basic structure of the FC. They are no longer binding precedents.

[94] It is my finding that art. 150(8) of the FC is constitutional. Hence, no judicial review can be made to challenge against the decision of the YDPA under art. 150(1) and art. 150(2B) of FC. In fact, this issue had been decided by the Court of Appeal and Federal Court in *Dato' Seri Anwar Ibrahim v. PP* (*supra*).

[95] Thus, since art. 150(8) of the FC is constitutional, issues regarding *mandamus* under prayer 1 (vii), (viii) and (ix) of encl. 1 sought by the applicants do not arise before the court.

Second Issue: Whether The Respondents Are Under A Constitutional Duty Pursuant To Article 150(3) Of The FC To Advise The YDPA To Summon A Meeting Of The Parliament For The Proclamation Of Emergency And Ordinance To Be Laid Before Both Houses For All Necessary And Appropriate Resolutions To Be Passed

[96] Generally, art. 40 of the FC provides that the YDPA carries out his duties under the Constitution under the advice of the Prime Minister and the Cabinet. It reads as follows:

> **Yang di-Pertuan Agong to act on advice**
>
> 40(1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet
>
> (1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.
>
> (2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:
>
> (a) the appointment of a Prime Minister;
>
> (b) the withholding of consent to a request for the dissolution of Parliament;
>
> (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting,
>
> and in any other case mentioned in this Constitution.
>
> (3) Federal law may make provision for requiring the Yang di-Pertuan Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than:
>
> (a) functions exercisable in his discretion;
>
> (b) functions with respect to the exercise of which provision is made in any other Article.

[97] Nevertheless, in this instant case, I will be specifically referring to constitutional duty of the respondents to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and Ordinance to be laid before both Houses for all necessary and appropriate resolutions to be passed.

[98] Article 150 of the FC is the governing provisions on emergency. Therefore the respondents' constitutional duty in this second issue must be stipulated in the art. 150 of the FC itself.

[99] Article 150(3) of the FC is reproduced as below:

> (3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).

[100] Article 150 cls. (2B) and (2C) of the FC are also reproduced herein:

> (2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.
>
> (2C) An ordinance promulgated under Clause (2B) shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinances under Clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make laws, regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament.

[101] However, after reviewing the entire art. 150 of the FC, I find that there is not a single sentence which states that the respondents have a constitutional duty to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and Ordinance to be laid before both Houses for all necessary and appropriate resolutions to be passed.

[102] Coming back to the facts in the present case, on 11 January 2021, the Prime Minister (first respondent) had been granted an audience with the YDPA where the Prime Minister presented his advice and/or the advice of the Cabinet of Ministers for His Majesty to issue a Proclamation of Emergency under art. 150(1) of the FC to control and reduce the Coronavirus Disease 2019 (Covid-19) cases in Malaysia.

[103] Upon receipt of the advice of the Prime Minister and/or the Cabinet as well as the consideration of the 'sembah taklimat' from a number of the highest-ranking public servants in different areas of civil service such as Ketua Setiausaha Negara, Peguam Negara, Panglima Angkatan Tentera, Ketua Polis Negara, Ketua Pengarah Kesihatan and Pengerusi Suruhanjaya

Pilihan Raya; and the YDPA also took into consideration of the discussion with Malay Rulers, the YDPA was of the view that the spread of the COVID-19 pandemic had reached a very critical stage and there was a need to issue a Proclamation of Emergency pursuant to art. 150(1) of the FC.

[104] The YDPA issued a Proclamation of Emergency dated 11 January 2021 which was published in the Federal Government *Gazette* on 12 January 2021 as P.U. (A) 7/2021. The Proclamation of Emergency shall extend throughout the Federation of Malaysia with effect from 11 January 2021 until 1 August 2021.

[105] The YDPA also promulgated the Emergency (Essential Powers) Ordinance 2021 (Ordinance) pursuant to art. 150(2B) of the FC on the premise that the YDPA was satisfied that immediate action was required. In the Ordinance, it is stated that a Proclamation of Emergency had been issued by the YDPA by reason of a grave emergency threatening the security, economic life and public order of the Federation of Malaysia arising from the COVID-19 pandemic.

[106] Section 14 of the Ordinance states as follows:

> Parliament sitting
>
> 14(1) For so long as the emergency is in force:
>
> (a) the provisions relating to the summoning, proroguing and dissolution of Parliament in the Federal Constitution shall not have effect; and
>
> (b) the Parliament shall be summoned, prorogued and dissolved on a date as the YDPA thinks appropriate.
>
> (2) Any meeting of the Parliament which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

[107] The Ordinance suspends the sittings of Parliament. Any meeting of the legislative bodies which has been summoned prior to the enforcement of the Ordinance that has not taken place is cancelled.

[108] Particularly, the provisions relating to the summoning, proroguing and dissolution of such legislative bodies shall have no effect during the subsistence of emergency. The summoning, proroguing and dissolution of such legislative bodies shall be on a date as the YDPA thinks appropriate.

[109] The Ordinance shall have the same force and effect as an Act of Parliament, until it is revoked or annulled by both Houses of Parliament, or until it lapses at the expiration of six months beginning with the date of cessation of the Proclamation of Emergency.

[110] By virtue of s. 18 of the Ordinance, the provisions of the Ordinance shall prevail over any provision of any existing written law.

[111] It is my opinion that art. 150(3), 150(2B), 150(2C) of the FC as well as ss. 14 and 18 of the Ordinance must be read together in order to determine this second issue.

[112] As any meeting or sitting of the Parliament which has been summoned before the coming into force of the Ordinance is cancelled, if it has not been held, the sitting of both Parliament is now being placed at the discretion of the YDPA.

[113] It is trite that the Ordinance promulgated by the YDPA can be enforced and is effective as if it were an Act of Parliament. It is effective until it is annulled. After the Parliament convenes, the Ordinance promulgated by the YDPA shall be tabled before both Houses of Parliament.

[114] The Ordinance can be continued if approved and must be stopped if it is not approved by the Parliament. If the Ordinance is not passed by the Parliament, it does not affect anything that happened before under the enforcement of the Proclamation of Emergency or Ordinance.

[115] In fact, the disapproval by Parliament also does not affect the power of the YDPA to make other Proclamations of Emergency or other Ordinances for such other emergency purposes. (The YDPA may make several proclamations at the same time or at different times, for the same reason or for different reasons).

[116] It is also worth noting that art. 150 of the FC is silent on the suspension of the sitting of both Houses of Parliament when a proclamation of emergency is in force.

[117] In this respect, it should be recalled that the ultimate purpose behind the Proclamation of Emergency and promulgation of the Ordinance is for the urgency to reduce the numbers of the COVID-19 positive cases. It is meant to guarantee the safety, security, economy, life and public order of the Federation and its people especially to all the members of the House of Parliament.

[118] Therefore, based on the above, I am of the view that the respondents are not under a constitutional duty pursuant to art. 150(3) of the FC to advise His Majesty the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and Ordinance to be laid before both Houses for all necessary and appropriate resolutions to be passed.

Third Issue: Whether A Mandamus Order Can Be Made To Direct The First Respondent To Lay The Proclamation Of Emergency And The Ordinance Before Both Houses Of Parliament For All Necessary And Appropriate Resolutions To Be Passed

Fourth Issue: Whether A Mandamus Order Can Be Made To Direct The First Respondent To Advise His Majesty The Yang Di-Pertuan Agong To Summon A Meeting Of The Parliament For The Proclamation Of Emergency And The Ordinance To Be Laid Before Both Houses Of Parliament For All Necessary And Appropriate Resolutions To Be Passed

[119] The third and the fourth issue will be dealt together.

Mandamus

[120] The Federal Court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641; [2008] 1 MLRA 705, held that an order of *mandamus* can be granted either:

(i) under s. 44 of the Specific Relief Act 1950 (the SRA); or

(ii) the additional powers of the High Court provided by para. 1 of the Schedule to the Courts of Judicature Act 1964 (CJA).

[121] It is also to be noted that O. 53 r. 1(2) of the ROC 2012 provides that this order (O. 53) is subject to the provisions of Chapter VIII of Part 2 of the SRA.

[122] Therefore, any application for an order of *mandamus* made by way of judicial review proceedings must comply with the requirement of s. 44 of the SRA.

[123] Section 44 of the SRA reads as follows:

Enforcement Of Public Duties

Power to order public servants and others to do certain specific acts

44(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge:

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[124] In *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56; [1972] 1 MLJ 180b; [1972] 1 MLRH 497, Sharma J had outlined four pre-requisites essential to the issue of an order under s. 44 of the SRA or of a *mandamus*:

(i) Whether the applicant has a clear and specific legal right to the relief sought;

(ii) Whether there is a duty imposed by law on the respondent;

(iii) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(iv) Whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him,

[125] Based on the case, in order to issue to the order of *mandamus*, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific and well defined as to be free from any reasonable controversy. The order cannot be issued when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent will deny the order of *mandamus*.

[126] Another important hurdle that needs to be crossed by the applicant for an order of *mandamus* is to show that there is a duty imposed by law on the respondent.

[127] In *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 1 MLRA 325; [2010] 4 MLJ 360 the Court of Appeal held:

A [38] In *MP Jain's Administrative Law in Malaysia and Singapore*, second edn, 1980, the learned author said, at pp 449 and 450:

> ... *Mandamus can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law,* and to keep the subordinate bodies
B and officers exercising public functions within the limit of their jurisdiction. *Mandamus* is thus a very wide remedy which is available against a public officer to see that he does his duty.
>
> What can be enforced through *mandamus* is a duty of a public nature the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has
C a power rather than a duty, and he does not use his power, *mandamus* cannot be issued. (emphasis added)

[128] In *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* (*supra*), Petrojasa Sdn Bhd (the respondent) had obtained a monetary judgment at the
D High Court against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the Government Proceedings Act 1956 ('the GPA'). The party named in the certificate is the Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an *ex parte* application for leave for judicial review for
E an order of *mandamus* against the Minister of Finance, Government of Sabah (the appellant) to pay the sum in accordance with the said certificate. Leave was granted. Nevertheless, the substantive application for judicial review was dismissed by the High Court.

F **[129]** On appeal to the Court of Appeal, the court allowed the appeal by the respondent. The appellant, then obtained leave to appeal to the Federal Court on one issue that is s. 33(3) of the Government Proceedings Act 1956 imposes a statutory obligation on the Government of Sabah to pay according to a certificate issued under s. 33(1) of the Government Proceedings Act 1956. Thus, the issue is whether judicial review proceedings may be taken
G against the Minister of Finance, Government of Sabah to compel the payment according to a certificate issued under s. 33(1) of the Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the State Government of Sabah.

H **[130]** Arifin Zakaria FCJ (as he then was) in answering the question above held *inter alia*, after referring to several passages in the judgment of the Court of Appeal in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 2 MLRA 286; [1996] 3 AMR 3181; [1996] 1 MLJ 481 held that:

I

> [81] From the above, the position in law is that, **there is a duty on the part of the government to pay the amount stated in the certificate issued under s. 33(3) of the GPA to the respondent.** It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*.
>
> (emphasis added)

[131] Therefore, in that case 'to put right what was plainly wrong in law' an order of *mandamus* was issued by the court to command the appellant to pay the judgment sum as stated in the certificate. (See also *Indira Gandhi* (*supra*)).

[132] It is clear from the above apex courts' decisions that both the abovementioned cases of *Petrojasa* and *Indira Gandhi*, the order of *mandamus* was issued based on the legal rights that the applicants had, that is the enforcement of a judgment of the court.

[133] In this present case, the applicants are seeking an order of *mandamus* to direct the first respondent to lay the Proclamation of Emergency and the Ordinance before both Houses of Parliament for all necessary and appropriate resolutions to be passed. The applicants also seek an order of *mandamus* to direct the first respondent to advise the YDPA to summon a meeting of the Parliament for the Proclamation of Emergency and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed.

[134] It is not in dispute that the Proclamation of Emergency was declared by the YDPA under art. 150(1) of the FC. It is also trite law that pursuant to art. 40(1) of the FC, the YDPA must act on the advice of the Prime Minister. In the context of this application, His Majesty, the YDPA will be acting on the advice of the Prime Minister. One thing that must be made clear; ie, what legal rights that the applicants have in directing the Prime Minister to tender the advice to the YDPA. It must also be noted that art. 150(8) of the FC bars any challenge be made to the emergency proclamation and the court has no power to entertain any proceeding or application to challenge the validity of the proclamation and the continued operation of such proclamation.

[135] Be that as it may, I am also of the opinion that there is no statutory or constitutional duty imposed by law on the first respondent, the Prime Minister to perform such duty.

[136] Based on the decided cases mentioned above, it is trite that where a statute imposes a duty, the performance or non-performance of which is not a matter of discretion, *mandamus* may be issued. But if an officer has power and not duty under the law, and if he does not use his powers, *mandamus*

A cannot be issued to compel him to exercise his power. There is also no issue that the first respondent has failed to perform a statutory duty with regards to the third and fourth issues. (See *Tun Dr Mahathir Mohamad v. Datuk Seri Mohd Najib Tun Hj Abdul Razak & Ors And Another Case* [2018] 8 CLJ 259; [2018] 8 MLJ 297).

B **[137]** Moreover, both of the order for *mandamus* applied by the applicants will consequently bind the YDPA. (refer to s. 14 of the Ordinance). By virtue of s. 44 (2) (a) of the SRA, it is clearly stated that nothing in that section shall be deemed to authorise a judge to make any order binding on the YDPA.

C **[138]** For all the above reasons, I am of the view that the prayers to order for *mandamus* in the third and fourth issues should be dismissed.

Conclusion

[139] Bearing in mind that this is an application for leave to commence judicial review proceedings under O. 53 of the ROC 2012, it is trite that test
D for leave to commence with judicial review be complied with.

[140] Having considered the application, I am of the opinion that the subject matter of this application is not amenable to judicial review. The applicants have failed to show that the decision made by the YDPA to proclaim
E emergency, and that the fact His Majesty was acting on the advice of the Prime Minister was as a result of illegality, unreasonableness or irrationality and procedural impropriety.

[141] It is reiterated that art. 150(6) and (8) of the FC are valid and constitutional. More importantly, art. 150(8) of the FC has shut the court's
F doors from any challenge or application be made against the proclamation and the ordinances enacted under the emergency law.

[142] In addition to that, I also reiterate that the applicants have failed to show an arguable case in order to obtain the order of *mandamus* at the substantive stage. The orders sought by the applicants are frivolous in nature.

G **[143]** All in all, it is my opinion that the applicants have failed to cross the hurdle of the judicial review test. As discussed above, the subject matter in this case have been settled by law. It is clear that there is no arguable case for the applicants. Therefore, this application for leave is frivolous.

H **[144]** Thus, this application for leave to commence judicial review proceedings ought to be dismissed.

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